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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 989 OCTOBER TERM, 1945

THE WM. SPENCER & SON CORPORATION (Plaintiff-Appellant in the Court Below), *Petitioner,*

vs.

SAMUEL S. LOWE, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, and LOUIS LINDENBERG (Defendants-Appellees in the Court Below),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

TABLE OF CASES CITED

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Wm. Spencer & Son Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on December 26, 1945 (R. 72), affirming the judgment of the District Court of the United States for the Southern District of New York (R. 62-63), which affirmed the decision of the Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, that the respondent, Louis Lindenberg, a lighter captain, was entitled to workmen's compensation under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act (R. 10-13).

Your petitioner respectfully requests that this Court review the decision of the Circuit Court of Appeals for the Second Circuit because said decision is in conflict with the decision in a similar case by the United States Circuit Court of Appeals for the Third Circuit in *Tucker* v. *Branham, Deputy Commissioner,* 151 F. 2d 96.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit brought in the United States District Court for the Southern District of New York by petitioner, pursuant to the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act (U. S. C. Title 33, Section 921), for a permanent injunction suspending and setting aside a compensation order and findings therein contained made by respondent, Samuel S. Lowe, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, on September 26, 1944, with respect to the benefits ordered to be paid to respondent, Louis Lindenberg, and permanently and perpetually staying the enforcement thereof. The District Court entered judgment dismissing the complaint (R. 187), which judgment was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 72).

Petitioner, as part of its business, engages to move freight in and about New York Harbor by means of vessels without motor power called lighters, gasoline hoisters and barges which are towed from place to place (R. 20-21). Respondent Lindenberg was a lighter captain by occupation (R. 20) and he was captain of petitioner's lighter "Boonton" (R. 21) which was afloat in the East River on June 6, 1944, the date he received his injuries (R. 44). Although some of the work done by Lindenberg was similar to that performed by longshoremen, checkers and talley men in connection with the loading and discharging of cargo

aboard vessels (R. 12), Lindenberg's duties also required him to direct the loading and discharging of freight to insure the vessel riding on even keel, pumping out water from the hold, making minor repairs, throwing lines to the dock when tying up and affixing them to the lighter when casting off from the dock; and tightening and loosening the lines from the lighter to the dock as occasion demanded (R. 12). The vessel had a cabin and eating and sleeping quarters which were used when the lighter captain worked overtime (R. 11). Lindenberg was employed as a lighter captain on a daily basis at a daily wage and paid for overtime. He had no seaman's papers and such papers were not required of him to perform his duties as a lighter captain. He was not furnished meals and lived off the boat except when actually on duty thereon while transferring freight in New York Harbor (R. 11). He received his injuries while he was painting the cabin of the vessel "Boonton" when he fell to the floor from a coal box upon which he was then standing (R. 12).

Respondent Lowe, as Deputy Commissioner, concluded that the services of Lindenberg were dissimilar to those of masters and members of the crews of vessels and that he was not a master or member of a crew of the lighter "Boonton" as the term "master or member of the crew of any vessel" is employed in Section 3(a)(1) of the Longshoremen's and Harbor Workers' Compensation Act (R. 12), although at the hearing he conceded that there was confusion in the Second Circuit as to the right of an employee in the same class with Lindenberg to seek compensation or to bring an action under the Jones Act for injuries received by him in the course of his employment (R. 51). He therefore made an award in favor of Lindenberg (R. 13), which was sustained in the District Court (R. 63) and the Circuit Court of Appeals, Second Circuit (R. 72).

QUESTION PRESENTED

Is a lighter captain excluded from coverage by the Longshoremen's and Harbor Workers' Compensation Act by Section 3 thereof as a "master or member of a crew of any vessel", as held by the Third Circuit, or is he included in said Act, as held by the Second Circuit.

REASONS FOR GRANTING THE WRIT

The discretionary power of this Court to grant the writ prayed for is respectfully invoked upon the following grounds:

1. The decision in the instant case by the Circuit Court of Appeals for the Second Circuit, rendered on December 26, 1945, is in conflict with the decision in an almost identical case by the Circuit Court of Appeals for the Third Circuit in *Tucker* v. *Branham, Deputy Commissioner,* 151 F. 2d 96, which was rendered on July 17, 1945, but which was not reported in time to be brought to the attention of the Circuit Court of Appeals for the Second Circuit in the instant case.

2. Petitioner, being engaged in moving freight in and about New York Harbor by means of lighters and barges, is confronted with the situation that if a lighter captain is injured on the New York side of the harbor, which is in the Second Circuit, the lighter captain would be covered by the Longshoremen's and Harbor Worker's Compensation Act, while if the lighter had crossed the Hudson River and was on the New Jersey side of the harbor, which is in the Third Circuit, the lighter captain would not be covered by that Act. Because of these conflicting decisions neither the employers nor the lighter captains can know which Federal law will govern a particular situation in the same

harbor, or which type of insurance, workmen's compensation insurance or liability insurance, must be carried for adequate protection, and such employers may be forced to carry both types of coverage until the law is fully settled.

PRAYER

Wherefore your petitioner prays that this Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Second Circuit, requiring that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full complete transcript of the record on its docket which is entitled The Wm. Spencer & Son Corporation v. Samuel S. Lowe, Deputy Commissioner, and Louis Lindenberg; that, upon such review and determination, the opinion and judgment of said Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE WM. SPENCER & SON CORPORATION,

By CHARLES LANDESMAN,
JOHN J. HICKEY,
WALTER W. AHRENS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the United States District Court, Southern District of New York, (R. 52-57) is reported at 59 F. Supp. 463. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 69-72) is reported at 152 F. 2d 847.

BASIS FOR JURISDICTION

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and reenacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Sec. 347, and Rule 38 of the Rules of this Court.

The judgment of the Circuit Court of Appeals for the Second Circuit which petitioner seeks to have reviewed was entered December 26, 1945 (R. 72).

STATEMENT OF THE CASE

The essential facts of this case have already been stated in the accompanying petition and need not be repeated here.

SPECIFICATION OF ERRORS

The errors which petitioner will urge if the writ of certiorari be granted is that the Circuit Court of Appeals for the Second Circuit erred:

1. In failing to find that claimant, a lighter captain, was "a master or member of a crew of any vessel", and therefore excluded from the application of the Longshore-

men's and Harbor Workers' Compensation Act in accordance with Section 3(a)(1) of that Act.

2. In failing to find that the duties of claimant, which the uncontradicted evidence showed were the maintenance and care of the vessel used for the transportation service, were purely navigational in character.

3. In failing to find that the deputy commissioner's decision with respect to coverage by the Act, is a question of law and therefore not conclusive on the courts.

4. In failing to follow its own decision in *United States Lighterage Corp.* v. *Hoey*, 142 F. 2d 484, where it held that a bargee having duties practically identical with those of claimant, was a seaman within the meaning of the Social Security Act.

5. In failing to find that this case is controlled by this Court's decision in *Norton* v. *Warner Co.*, 321 U. S. 565.

6. In affirming the judgment of the District Court.

ARGUMENT

Respondent Lindenberg Was a "Master or Member of a Crew" of a Vessel and, Therefore, Not Covered by the Provisions of the Longshoremen's and Harbor Workers' Compensation Act.

The Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as the Compensation Act) was passed in 1927 to provide that longshoremen or those mainly employed in loading, unloading, refitting and repairing ships were entitled to compensation under that Act and for them that remedy was made exclusive. (Senate Report No. 973, 69th Congress, 1st Session, page 16). On the other hand one employed in navigable waters as a

"master or member of a crew", and receiving injuries in the course of his employment, is not covered by the Compensation Act but is protected by the maritime law and may also sue under the Jones Act for injuries suffered in the course of his employment.

This Court has previously had occasion to consider the meaning of the Compensation Act. In *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, the Court held that a lighter bargeman employed on a lighter primarily for the purpose of helping unload its cargo, by standing beside the coal chute and removing obstructions as the coal flowed out, and who had no navigational duties other than throwing the ship's rope in releasing or making the boat fast, came under the Compensation Act.

And in *Norton* v. *Warner*, 321 U. S. 565, the facts showed that the duties of Rusin, the injured bargeman, consisted of taking general care of the barge, including taking care of the lines at docks, tightening or slackening them as necessary; repairing leaks; pumping out the barge; taking lines from tugs; responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tugboat when being towed; moving the barge at piers by the capstan. This Court found that Rusin was a member of the crew, even though he was the sole person aboard or employed upon the barge, and not covered by the Compensation Act.

In *Tucker* v. *Branham, Deputy Commissioner,* decided by the Circuit Court of Appeals for the Third Circuit, 151 F. 2d 96, the Deputy Commissioner had found that the deceased employee, Dillon, (1) had been employed on the barge "Army" as a caretaker, (2) that it was his duty when excessive leakage occurred, to attend to and to supervise the loading and unloading thereof, to fasten and unfasten lines as necessary and at all times to protect the barge from damage and otherwise safeguard the interest

of its owner; (3) that his duties were limited to the barge "Army"; (4) that he was the only person employed thereon; (5) that he lived, ate and slept on the barge and bought his own meals; (6) that he was not a qualified or licensed seaman and held no seaman's papers; (7) that said barge had no motive power of its own and was towed by tug boats; (8) that its operations were confined principally to the Philadelphia harbor; (9) that the duties performed by Dillon prior to his death did not relate principally to the navigation of the said barge, but on the contrary his duties had substantially no relation to navigation, being principally the duties incident to common labor and custodial service; and (10) that Dillon was not a master or member of a crew. The Court of Appeals held that the second finding above demonstrated that Dillon aided in the navigation of the barge, and that although Dillon had some duties in respect to the loading and unloading of the barge, nevertheless these duties were for the purpose of making sure that the loading or unloading was done in such a way that the barge would not be injured by excessive strain or capsized by unequal loads. The Court therefore concluded that Dillon was a "master or member of the crew" and not covered by the Compensation Act.

The record in the case at bar discloses that respondent Lindenberg instructed the longshoremen where to place the cargo as it was brought aboard the vessel for the purpose of proper stowage (R. 29); he remained with the vessel when it was towed from one point to another, and attended to lines (R. 24); he painted the lighter and took care of the upkeep of the engine (R. 25, 27); he took orders from petitioner's dispatching department except when in tow (R. 27); he handled the lines between the tug and his lighter, which he stated it was his duty to do (R. 24); he

observed that the merchandise was properly stowed so that no damage might come to the vessel while it was in tow (R. 29); he was responsible for the protection of the lighter from injury or damage (R. 29); he examined the boat for leaks (R. 30-31); pumped the water when it reached a certain level in the hold of the lighter (R. 34); slept on the lighter (R. 34) and ate aboard ship from time to time (R. 22); had a stove in the cabin of the lighter which could be used for the purpose of making coffee (R. 36); took general care of the barge and observed the condition of the lines when the lighter was berthed to see that they remained taut and fixed the lines as the tide rose and fell (R. 36); he observed the approach of other lighters carefully to avoid injury or damage to his lighter when they tied up alongside of it (R. 37); took care of leaks (R. 37); was towed at night on occasions (R. 37) and used the engine of the lighter to move the lighter from one berth to another berth at the same pier (R. 37). On the day of his injuries he was engaged in painting the cabin of his lighter (R. 45). On these facts the Circuit Court of Appeals for the Second Circuit concluded that Lindenberg was not a "master or member of a crew of any vessel" and therefore covered by the Compensation Act.

The Commissioner in the instant case conceded that there was confusion in the Second Circuit as to the right of an employee in the same class with Lindenberg to seek compensation or to bring an action under the Jones Act for injuries received by him in the course of his employment, and recognized that employers, such as petitioner, would probably have to cover themselves by insurance in two ways because of the Compensation Act and also because of the possible right of action under the Jones Act. (R. 51)

In view of the decision in the instant case in the Second Circuit, and the decision in the *Tucker Case* in the Third

Circuit, great uncertainty confronts both employers, such as petitioner, and employees, such as Lindenberg. It is thus possible at the present time that if a lighter captain working for petitioner (petitioner being authorized to do business in both New York and New Jersey) were to injure his right leg when the lighter is leaving a New York pier and on the same day were to injure his left leg when the lighter reaches the New Jersey pier, he could not sue under the Jones Act in the Second Circuit for injuries to his right leg, but would be limited to his rights under the Compensation Act, and as to his left leg he would not be entitled to compensation in the Third Circuit but would be forced to sue under the Jones Act.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

CHARLES LANDESMAN,
JOHN J. HICKEY,
WALTER W. AHRENS,
Counsel for Petitioner.

APPENDIX

Relevant Statutory Provisions

Section 3 of the Longshoremen's and Harbor Workers' Compensation Act, reads in part as follows:

> "*Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—
>
> "(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or . . . " (Mar. 4, 1927, c. 509, Sec. 3, 44 Stat. 1426; U. S. C. Tit. 33, Sec. 903.)

Section 21 of said Act, reads in part as follows:

> "*Review of compensation orders.* . . .
>
> "(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage

would result to the employer, and specifying the nature of the damage. . . ." (Mar. 4, 1927, c. 509, Sec. 21, 44 Stat. 1436, as amended June 25, 1936, c. 804, 49 Stat. 1921; U. S. C. Tit. 33, Sec. 921.)

The Jones Act, reads in part as follows:

"*Recovery for injury to or death of seaman.*—

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007; U. S. C. Tit. 46, Sec. 688.)

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OCTOBER TERM, 1945

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Petitioner,

—against—

SAMUEL S. LOWE, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, and LOUIS LINDENBERG,
Respondents.

BRIEF FOR RESPONDENT LINDENBERG IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Statement

The question to be determined is whether the respondent Louis Lindenberg was a member of the crew as that term has been defined by this Court in the cases of *South Chicago* v. *Bassett*, 309 U. S., page 251 and

Norton v. *Warner*, 321 U. S., page 565. This Court has held that it does not matter whether the injured is called a seaman or member of a crew. His duties determine his status.

Generally speaking, when the work of an employee is in furtherance of navigating a vessel, he is considered a member of the crew and a seaman. Where the duties of an employee are in the main concerned with loading and unloading a vessel, checking cargo and other shore duties, he is not considered a member of the crew, although a small portion of his duties may be in furtherance of navigating the vessel.

The facts will be considered under the various points in this brief.

POINT I.

The decision in the case of Tucker v. Branham, 151 Fed. 2d, page 96, is not in conflict with the decision in the case at bar.

The duties of respondent Lindenberg concerned the loading and unloading of lighters and were not in aid of navigation.

Counsel for respondent Lindenberg desires to set forth a summary of the duties as testified to by claimant Lindenberg in the case at bar. These duties will then be compared with the duties as found by the Deputy Commissioner in the case of *Tucker* v. *Branham*, *supra*. (Reference is to the folios in the Transcript of

Record on appeal from the District Court for the Southern District of New York.

Duties of Respondent Louis Lindenberg

1. He operates a hoister on a lighter which is a non-propelled vessel for loading and unloading of cargo. (32, 33, 34.)

2. Works 8 hours daily from 8:00 A. M. to 5:00 P. M. (33, 64.)

3. Is paid on a daily basis at the rate of $7.80 per day. (33, 64.)

4. Is not furnished meals or sleeping quarters aboard the vessel. (33, 64.)

5. Does not live aboard the vessel. (33, 64.)

6. Lived and slept on shore except that during a period of six months prior to the trial when he had to spend 24 consecutive hours on board watching cargo, he slept aboard six or seven times out of a total period of 168 days. (104.)

7. Procured bills of lading in relation to cargo. (34, 66, 67.)

8. Examined and checked each piece of freight as it was loaded onto and discharged from the lighter. (74, 66, 67.)

9. When watching the cargo, he was paid an additional remuneration. (35, 64.)

10. The loading and the unloading of the lighter re-

quired the service of the respondent the greater portion of the day. (123, 124, 65.)

11. When there was loading and unloading, the shore duties required the respondent to leave his vessel 20 or 30 times daily. (85.)

12. When operating a hoister, this work was comparable to the duties of a winchman aboard a large vessel. (67.)

13. Had no duties while the lighter was being towed except to handle an occasional line. (70, 71).

14. The vessel was seldom towed at night. (77.)

15. The lighter did not travel beyond the confines of New York Harbor. (63, 99.)

16. Had no experience as a seaman. (33, 107.)

17. To pump water from hold. (32, 34.)

18. Making minor repairs. (34.)

19. Throwing lines to the dock when tying up. (34.)

The Deputy Commissioner, in his opinion (folio 35) found:

> "That the principal duties of the claimant were similar to those performed by longshoremen, checkers, and talleymen in connection with the loading and discharging of cargo aboard vessels and on the dock, and were not principally in connection with the navigation of the vessel, and hence, dissimilar to those of masters and mem-

bers of the crews of vessels and that he was not a master or member of the crew of the lighter 'Boonton' as the term 'master or member of the crew of any vessel' is employed in Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act."

Undoubtedly the Deputy Commissioner based his decision on the undisputed and uncontradicted testimony given by the respondent Lindenberg when he stated that during the 8-hour workday, loading and unloading took up the greater portion of the day. At folios 123 and 124, Lindenberg testified:

"Q. For the eight hours? A. From five at night till three in the morning, fourteen hours.

Q. How much of the time that you work during the day is devoted to the checking of cargo in or out? Is there any way of fairly apportioning your day's time as regards checking the operation of the winch and the pumping out of water and whatever thing that you might have to do? A. Well, that requires the biggest part of the day.

Q. What? A. The checking and the loading and unloading of the lighter."

At folio 65, Lindenberg testified:

"Q. Will you tell me just exactly what your duties were from the time that you went aboard the vessel in the morning until you finished at night? A. To assist in the loading and unloading, and in doing so, I had to operate an engine most of the time."

We will now compare the foregoing testimony relating to the duties of the respondent Lindenberg with the duties of the claimant in the case of *Tucker* v. *Branham,* 151 Fed. 2d, page 96 and passed upon by the District Judge, reported in 56 Fed. Sup., page 61. In a portion of the opinion by the District Judge, the duties of the claimant in the *Tucker* v. *Branham* case, *supra,* is set forth on page 62 as follows:

> "That his duties were limited to the barge Army, that he was the only person employed thereon, that he lived, ate and slept on the barge and bought his own meals * * * that he was furnished living quarters on the vessel."

The Circuit Court of Appeals found that the main duties of the claimant in the *Tucker* case were in aid of navigation. An entirely different situation exists in the case at bar. The Deputy Commissioner, in his examination, was careful to bring out the ratio of harbor and longshore work that Lindenberg performed to his nautical duties. As we have previously stated, Lindenberg testified that the loading and unloading of the lighter required his services the greater portion of the day. (123, 124, 65). Under those circumstances, the Deputy Commissioner in the case at bar was justified (folio 35) in stating:

> "That the principal duties of the claimant were similar to those performed by longshoremen, checkers and talleymen in connection with the loading and discharging of cargo aboard vessels and on the dock, and were not principally in connection with the navigation of the vessel."

POINT II.

The Deputy Commissioner found on the undisputed testimony that Respondent Lindenberg performed longshore work and therefore was not a master or member of the crew of a vessel.

The Deputy Compensation Commissioner was not required to pass upon the facts in the case at bar. The testimony given by Louis Lindenberg, the respondent, was not contradicted. Under the circumstances, the findings by the Deputy Commissioner was based upon undisputed testimony.

The evidence given by Louis Lindenberg and found to be true by the Deputy Commissioner, leads to but one conclusion, that Lindenberg was not a member of the crew as defined by this Court, and under the circumstances, he was entitled to the benefits of the Workmen's Compensation Act. It is quite true that some of the duties which the claimant Lindenberg performed were in aid of navigation, but as was stated by this Court in *South Chicago* v. *Bassett,* 309 U. S., page 251, the mere fact that some of the work performed by the claimant in that case pertained to navigation would not deprive the injured of his right to claim the benefits of the Workmen's Compensation Act.

The opinion of the Honorable Edward A. Conger, District Court Judge appears at folios 154 to 171. In the main it is a review of and a discussion of the findings of the Deputy Commissioner. At folios 167 to 169, the District Court stated:

"An examination of the record of the hearing before the Commissioner in my opinion substantiates his findings. The inference would seem to be that Lindenberg was primarily concerned with operating the hoisting machine, and checking and supervising the loading and discharging of cargo rather than the navigation of the vessel. True, he did concern himself with some activities of a navigational nature such as throwing lines and the like, but upon the whole it seems clear that his principal duties 'were similar to those performed by longshoremen, checkers and talleymen'. Even if a different inference could be gained from these factors, it would not justify an upsetting of the award.

Norton v. *Warner, supra;*

Southern Chicago Co. v. *Bassett, supra;*

Voehl v. *Indemnity Insurance Co.*, 288 U. S. 162;

Parker v. *Motor Boat Sales,* 314 U. S. 244."

POINT III.

This Court and the various Circuit Courts of the United States have never decreed that a person employed on a vessel was a seaman when his duties on board the vessel were not in aid of navigation but concerned the loading and unloading of the said vessel.

This Court in the case of *South Chicago* v. *Bassett,*

309 U. S. page 251 and quoted with approval in *Norton* v. *Warner Co.*, 321 U. S. page 565, has stated that a person employed on a vessel whose duties are to further the navigation of the vessel is to be considered a seaman. Those employed on a vessel whose duties do not concern or aid navigation are considered harbor workers. The mere fact that a person appears upon the ship's articles as a member of the crew and a seaman will not make him one, when his duties are not in aid of navigation.

The decision in the case of *South Chicago* v. *Bassett* is an extraordinary one in many respects. In that case the claimant appeared as a member of the crew on the ship's articles. This Court, in its opinion on page 254 stated:

> "The statute provides specifically — that no compensation shall be payable in respect of the disability or death of a master or member of a crew of any vessel * * * it appears that the vessel was a lighter of 312 net tons used for fueling steam boats and other marine equipment. * * * The Court of Appeals thus summarized its operations. It supplied coal to other vessels on their order, each operation consuming a couple of hours. It had no sleeping or eating quarters. Its Certificate of Inspection required that included in the entire crew hereinafter specified and designated, there must be one licensed master and pilot, one licensed chief engineer, three seamen, one fireman. If the deceased was counted as a member of the crew, a full complement of the ship was present; otherwise not. The Captain testified before the Deputy Commissioner that he had five men on the boat with him, one engineer, fireman and three deckhands, the de-

cedent being of the latter. The Court of Appeals designated his chief task as facilitating the flow of coal from his boat to the vessel being fueled —removing all obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He did some cleaning of the boat. He did no work while the boat was enroute from dock to the vessel to be fueled. The Court of Appeals thought it significant that his only duty relating to the navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fueled boat while both boats were at rest; that he had no duties while the boat was in motion; that he was paid an hourly wage; that he had no articles; that he slept at home and boarded off the ship."

At page 258 the Court stated:

"Petitioners urge that the question whether the decedent was a member of a crew was a question of law. That is, that upon the undisputed facts, the decedent must be held as a matter of law to have been a member of the crew as distinguished from a longshoreman or laborer at work upon the vessel. We are unable so to conclude. The word 'crew' does not have an absolutely unvarying legal significance."

At page 260 the Court stated:

"Regarding the word 'crew' in this statute as referring to the latter class, we think there was evidence to support the finding of the Deputy Commissioner.

> * * * The fact that the certificate of inspection called for three 'deckhands' and the captain included the decedent to make up the complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the Court considered as supporting the findings of the Deputy Commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water'. *Schaeffler* v. *Moran Towing Co.*, 68 F. 2d 11, 12."

The case of *Norton* v. *Warner Co., supra*, decided by this Court in March, 1944, was reported in 321 U. S. page 565 would seem at first to be a decision contrary to the views expressed by counsel for the claimant. As a matter of fact the contrary is true.

The views expressed by this Court in the *Norton* decision are in harmony with the findings of the Deputy Commissioner in the case at bar.

The Court in the *Norton* decision specifically found that the duties of Rusin, the claimant related to the navigation of the barge. This Court pointed out that Rusin had no duties which concerned the loading and

unloading of the barge. Rusin ate and slept on board the barge and was hired at a monthly basis. He had a permanent attachment to the vessel.

In the case at bar the contrary is true. In the decision of the Deputy Commissioner, the following appears: That the claimant did not during the entire period of employment by the plaintiff live on board the vessel. That his work day began at 8:00 A. M., and finished at 5:00 P. M. constituting an 8-hour day. His duties were performed on a lighter owned by the plaintiff, which lighter was a vessel not propelled by its own motive power. The work did not require the claimant to sleep, live nor eat aboard the vessel, and the employment was only on an 8-hour basis.

The principle occupation of the claimant was loading cargo onto the plaintiff's lighter and unloading the cargo by means of a gasoline operated hoister which constituted a part of the lighter. These duties were comparable to longshoremen or winchment who load and unload vessels. It was alleged by the claimant, Lindenberg, that he worked with other longshoremen in placing the cargo onto different portions of the deck of the various lighters they were employed on.

When the claimant reported to work at 8:00 A. M. there were many shore duties which had to be attended to such as checking the packages and pieces of cargo on the pier to see that their markings were correct. His duties also concerned the hiring of longshoremen that were to assist him in the loading and unloading of the vessels. At 5:00 P. M. all employees went home. Ths work was comparable to that of a foreman stevedore. The claimant was also required to notice the condition of the cargo which was to be loaded and unloaded and to check the same. These duties were comparable to that of a checker.

We will now take up the decision in the case of *Norton* v. *Warner Co., supra.* Mr. Justice Douglas in holding that Rusin, the claimant was a member of the crew and a seaman, stated at page 567:

> "Rusin was employed as a boatman on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing * * *. Rusin was employed under a union contract with respondent which stated that all Bargemen assigned to specific barges in active operation were to be paid a monthly salary of $80 and were to be provided with quarters. It also stated that compensation was for all work performed by Bargemen in the operation of his own vessel and that the rates provided were based upon all services and time required to safeguard and operate the barge fleet including necessary pumping, watching or other emergency duties on Sundays and holidays. Rusin was continuously aboard. He bought his own meals and lived, ate and slept on the barge * * *. His duties consisted of taking general care of the barge. They including taking care of the lines at docks, tightening them or slackening them as necessary, and repairing leaks, pumping out the barge; taking lines from tugs, responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tug boat when being towed; moving the barge at piers by the captain. * * * ***But he had no duties in connection with the handling of cargo and no shore duties.***" (Italics ours.)

In another portion of the opinion at page 572, the Court stated:

> "And we are told by the Senate Report as already noted, that the purpose of the legislation was to provide compensation for those who 'are mainly employed in loading, unloading, refitting and repairing ships.' S. Rep. No. 973, *supra*.
>
> Rusin, unlike the employee in the *Bassett* case, did no work of the latter variety. He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. * * * The contract under which he was employed stated that the compensation was 'based upon all services and time required to safeguard and operate the barge fleet.' The services rendered conformed to that standard and no other. Rusin moreover had that permanent attachment to the vessel which commonly characterizes a crew."

This Court in holding that Rusin was a member of the crew and a seaman, stated at page 568:

> *"But he had no duties in connection with the handling of cargo and no shore duties."* (Italics ours.)

In the *Norton* v. *Warner* decision this Court in analyzing and approving its previous decision in *South Chicago* v. *Bassett*, 309 U. S. at page 572, commented upon the fact that the duties of Rusin in the *Norton* case were unlike the duties of the employee in the *Bassett case*. Rusin did not have any duties which related to loading and unloading of the vessel. The *Norton* decision has definitely established the fact that one employed on a lighter is considered a seaman even though he is the only employee on the lighter where he has a permanent attachment to the vessel such as

eating and sleeping on board the vessel; where his contract of employment provides that he stay on board the vessel 24 hours daily and where his duties are solely concerned in furtherance of navigation.

In the case of *Puget Sound* v. *Marshal*, 125 Fed. 2d, page 876, the Court at page 879 stated:

> "The situation presented in the instant case is different from that before the Court in the *Mechling* case. Here it is conceded that claimant's duties were same as any regularly employed longshoremen on Puget Sound with the exception that he traveled from port to port with the vessel. He had no duties at all to fulfill while the boat was under way."

At page 579 the Court stated:

> "The distinction between the longshoreman and the crew member seems to hinge upon whether or not the employee is naturally and primarily on board the vessel to aid in her navigation. The work done by the claimant had no more relation to navigation than does that performed by a regular longshoreman engaged at a port to assist in loading and discharging the cargo or boat."

The case of *DeWald* v. *Baltimore & O. R. Co.*, 71 Fed. 2d, page 811 was cited with approval by this Court in the case of *South Chicago* v. *Bassett*, 309 U. S. page 260. The facts in the *DeWald* case have a striking similarity to the facts in the case at bar. In the *DeWald* case the Court at page 812 stated:

> "The Longshoremen's & Harbor Worker's

> Compensation Act was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the State * * * and while Congress has not in the act definitely classified those persons who are entitled to receive the benefits under it, it is hard to conceive of one who would come more definitely within the meaning of the word 'harbor worker' than DeWald. His main duties as found by the Deputy Commissioner, were the checking and supervising the loading and unloading of cargo from barges and keeping all records with regard to the cargo. Said work as he did in making fast lines at docks or alongside vessels and pumping water out of the barges was incidental to his main employment. He did not live upon the barge but went home every night. The barges were not navigated under their own power but were towed and never left the harbor."

In the case of *Moore* v. *Pillsburg*, 100 Fed. 2nd, page 245, approved in the case of *South Chicago* v. *Bassett*, 309 U. S. page 260, the Court at page 245 stated:

> "On March 21, 1936, William H. Howland, husband and father of appellees, while performing services for appellant, as an employee aboard its certain power launch or tug known as Moore No. 2, then lying on the navigable waters of the United States sustained personal injuries occurring in the course and arising out of his employment and resulting in his death, in that while making some repairs on the deck of the launch to certain of its equipment, he fell into the water and was drowned."

At page 246 the Court stated:

> "The Deputy Commissioner made a finding to the effect that the employment of said employee was essentially that of a harbor worker and not that of a seaman as said term is used in the Longshoremen's & Harbor Workers' Compensation Act, and that he was not a member of the crew of the vessel at the time of his injury and death."

At page 247 the Court stated:

> "In the light of these decisions Howland could not be classified as a seaman so as to exclude him from the operation of the act. * * * We believe therefore that Howland must be classified in the category of a harbor worker and not that of a seaman."

In the case of *Beddo* v. *Smoot Sand & Gravel Corp.*, 28 Fed. 2d, the Court at page 610 stated:

> "Passing then to the question whether or not the particular employee involved was at the time of his death a member of the crew of the vessel, the court said the question should be answered in relation to his actual duty and that, since in that case, these did not pertain to navigation aside from the incidental task of helping make the boat fast when mooring alongside of another boat or at the dock, * * * he was appropriately within the class of longshoremen or other casual workers on the water and hence within the provisions of the Longshoremen's Act. In that case, as in the instant case, the man was carried on the payroll as a deck hand but the actual duties—the tests supplied by the Supreme Court—of the decedent there and

of the injured here, were so nearly alike as to make the rule in that case definitely applicable here."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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INDEX

CITATIONS

691617—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 989

THE WM. SPENCER & SON CORPORATION, PETITIONER

v.

SAMUEL S. LOWE, DEPUTY COMMISSIONER OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, SECOND COMPENSATION DISTRICT, AND LOUIS LINDENBERG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 52–57) is reported in 59 F. Supp. 463. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 69–72) is reported in 152 F. 2d 847.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 26, 1945 (R. 72). The

petition for a writ of certiorari was filed on March 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there was evidence to sustain the finding of the Deputy Commissioner that claimant was not "a master or member of a crew" within the meaning of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act and was therefore entitled to payment under its compensation provisions.

STATUTE INVOLVED

Section 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 1425 (33 U. S. C. 902 (3)) provides as follows:

> Definitions. When used in this Act—
>
> * * * * *
>
> (3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3 (a) (1) of the same Act (33 U. S. C. 903 (a) (1)) provides:

> Coverage.—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an

injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; * * *.

STATEMENT

The facts in the instant case are undisputed and are as follows:

Wm. Spencer & Son, a self-insurer under the Act and petitioner herein, is in the business of lighterage, namely, the handling of freight by lighters, gasoline hoisters and barges in and around New York Harbor (R. 20). As its business was summarized by its attorney, "primarily it is the loading and unloading of railroad lighters and barges within the Harbor of New York" (R. 20).

Claimant, Louis Lindenberg, was employed as a lighter captain by petitioner for a number of years (R. 20). He had no master's papers, none were required (R. 20–21), and he had no experience as a seaman (R. 36). On the date of the accident, June 6, 1944, he was working for petitioner on a gasoline hoister named the "Boon-

ton" (R. 21). This barge, like many others owned by petitioner, had no means of self-propulsion and was always towed. It was shaped like a scow, was 120 feet long, 32½ feet wide, and carried about 475 tons. To assist in loading and unloading the cargo, the vessel carried a mast and boom and a 15 horsepower gasoline engine (R. 21). The barge had a cabin 6 x 12 feet which was used in rainy weather (R. 22) and contained a stove, generally used for heat (R. 35).

Lindenberg worked on the barge alone (R. 21) and was employed on a per diem basis, being paid only when he worked (R. 26). His usual hours of work were from 8 a. m. to 5 p. m. and he was paid at the rate of $7.80 for such a working day; for overtime after 5 p. m., he received $1.16 an hour (R. 22). Claimant lived ashore, usually ate breakfast and dinner ashore, brought his own sandwiches for lunch and, with rare exceptions, left the barge each evening (R. 22, 35). He testified that there was very little night work (R. 26, 37) and that in a six-months period he slept aboard about five or six times (R. 34).

Claimant's duties were to pick up the bills of lading and to check and tally the cargo while it was being loaded and unloaded (R. 22, 25). He supervised its stowage (R. 23) and operated the engine which was used in loading and discharging cargo (R. 22). While the barge was under tow to its destination, claimant remained aboard but

the tug deck hands, such as the mate, usually did all the work (R. 24, 27). At such times claimant might occupy himself by preparing slings to be used in unloading (R. 30). He aided in fastening and unfastening lines (R. 24), in checking for leaks and pumping the barge (R. 30, 34), in painting and in checking the engine (R. 25), taking care of lines at the docks (R. 36), and in moving the barge from one position to another at the pier with the aid of others (R. 37).

His uncontradicted testimony indicated that his work in checking, loading and unloading occupied "the biggest part of the day" (R. 41–42).

On June 6, 1944, the barge was tied up on the north side of Pier 29 in the East River (R. 44–45). Lindenberg was standing on a coal box, painting the cabin, when he lost his balance, fell to the floor, fractured his wrist and dislocated his left elbow (R. 45). The facts of his employment, accident and injury are admitted by petitioner (R. 19). At the hearing before the Deputy Commissioner, jurisdiction was contested on the ground the claimant was a captain or a member of a crew and therefore was excepted from the coverage of the Longshoremen's and Harbor Workers' Compensation Act (R. 19, 47). The Lighter Captains' Union, a local of the International Longshoremen's Association, supported claimant and expressed the view that its members were entitled to the protection of

the Act (R. 18–19, 49–50). The Deputy Commissioner found (R. 12) that

> * * * the principal duties of the claimant were similar to those performed by longshoremen, checkers and talleymen in connection with the loading and discharging of cargo aboard vessels and on the dock, and were not principally in connection with the navigation of the vessel, and hence, dissimilar to those of masters and members of the crews of vessels and that he was not a master or member of the crew of the lighter "Boonton" * * *

and made an award to Lindenberg (R. 13).

In an action to enjoin the award brought by petitioner, the District Court for the Southern District of New York adopted the findings of the Deputy Commissioner as its own and affirmed the award on the ground that there was evidence to support the findings (R. 52–57). Upon appeal, this judgment was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 69–72), which held that the facts in the instant case brought it within the holding of this court in *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U. S. 251, rather than that in *Norton* v. *Warner Co.,* 321 U. S. 565.

ARGUMENT

The determination of the Deputy Commissioner that an employee is not "a master or member

of a crew" is a conclusion or inference entitled to finality if supported by the evidence and reasonably inferable therefrom. *Voehl* v. *Indemnity Insurance Co.,* 288 U. S. 162, 166; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287; *South Chicago Coal and Dock Company, et al* v. *Bassett,* 309 U. S. 251, 258; *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 246. Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 131; *Davis* v. *Department of Labor,* 317 U. S. 249, 256. The duties of the employee in the instant case are, in all important respects, hardly different from those of the employee involved in *South Chicago Coal and Dock Co.* v. *Bassett, supra,* in which the employee called each day to ascertain if he was wanted, was paid an hourly wage, slept at home and boarded off the ship, and had the primary task of facilitating the flow of coal while it was being discharged from his vessel, rather than any job which was navigational in character. The finding of the Deputy Commissioner that Lindenberg was not a member of the crew has as rational a basis here as there.

The findings in the instant case, for which the district court and the circuit court of appeals found support in the evidence, do not rest upon an error of law within the holding of this court in *Norton* v. *Warner Co., supra,* and the facts of the two cases are clearly distinguishable. In the

Warner case, the employee, Rusin, had no loading or unloading duties of any kind, was paid a monthly salary, ate and lived on the barge at all times so that he had a "permanent attachment to the vessel which commonly characterizes a crew" (321 U. S. 565 at 573), and had primary duties of a navigational character, such as putting out lights and signals, taking orders from the tug when under tow, attending to lines, etc. In this case, Lindenberg's primary duties, as indicated by his uncontradicted testimony and as found by the Deputy Commissioner, were to assist in the loading and unloading of cargo. Furthermore, he ate and lived ashore, was employed on a daily basis, and had no navigational duties while under way (R. 12, 24, 31–33).[1]

Petitioner relies upon a decision of the Circuit Court of Appeals for the Third Circuit in *Tucker* v. *Branham,* 151 F. 2d 96 as being in conflict with the decision of the Second Circuit Court of Appeals in the instant case. In our view, that decision is also distinguishable on its facts from

[1] This difference in the nature of the respective claimants' duties may account for the fact that the maritime unions in the *Warner* case took the position that their members came within the definition of "member of a crew" and were therefore excepted from the Act, while the Lighter Captains' Union in the present case felt that their members came within its provisions and were not excepted as a "member of a crew" (R. 50, 58–59).

the case at bar. The caretaker in the *Branham* case, like Rusin in the *Warner* case, lived, slept and ate on his barge. The Third Circuit Court of Appeals also found that while the caretaker had some loading and unloading duties, his function in this regard was to see that the barge was not injured by excessive strain or capsized by unequal loads. As we have noted, claimant in this case actually assisted in the physical work of loading and unloading cargo and this occupied the major portion of his time. In borderline cases, minor differences of facts may lead to what otherwise would appear to be divergence of results. Under the congressional scheme, there can be no escape from this difficulty of anticipating coverage, each case turning, as it does, on its particular facts. Here the court below recognized and gave full effect to the decisions of this court in the *South Chicago* and *Warner Co.* cases, and undertook to apply the law of those cases to the facts here involved. In such circumstances we submit that there is no necessity for this Court to review a decision of this character, particularly where it accords with the rulings of the Deputy Commissioner.

CONCLUSION

The decision below is correct and involves no more than the reasonableness of certain inferences to be drawn from undisputed facts. We

respectfully submit, therefore, that the writ of certiorari should be denied.

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